Neutral Citation Number: [2020] EWCA Crim 1234

Case No: 202000581 & 202000585 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BIRMINGHAM CROWN COURT
HIS HONOUR JUDGE FOWLER
T20190159

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/09/2020

Before :

LORD JUSTICE BEAN
MR JUSTICE LAVENDER
and
MRS JUSTICE COCKERILL

- -

Between :

(1) WESTERN TRADING LTD **(2) CHINDERPAL SINGH**	**Appellants**
- and -	
THE QUEEN	**Respondent**

- -
- -

Andrew Smith QC (instructed by **Murrias Solicitors**) for the **Appellant**
Joseph Millington (instructed by **Solicitor, Birmingham City Council**) for the **Respondent**

Hearing date: 10 September 2020

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Approved Judgment

Lord Justice Bean:

1. Western Trading Limited ("the company") is the registered freehold proprietor of a Victorian commercial building on Constitution Hill in Birmingham. Chinderpal Singh is the sole active director of the company and a shareholder in it, though not the only one. The company and Mr Singh both appeal with the leave of the single judge against fines imposed by His Honour Judge Fowler in the Crown Court at Birmingham in respect of breaches of a Listed Building Enforcement Notice (LBEN) and a Planning Enforcement Notice (PEN) concerning the building issued on 9 April 2014 by the local planning authority, Birmingham City Council.

2. The majority of the building is Grade II listed. After acquiring the building the company had works undertaken to the shop fronts without planning permission or listed building consent. The timber shop fronts were removed and replaced by painted metal shop fronts.

3. Both the LBEN and the PEN required various steps to be taken to remediate the effect of the unauthorised works to the shop fronts. The original deadline specified was in November 2014, but the company appealed against the notices; the effect of the appeals was to extend the time for compliance until 23 October 2015. The LBEN and the PEN each had identical requirements, namely to remove the roller shutter doors and boxes and the unauthorised shop fronts and to reinstate traditional timber shop fronts of the same design as the original shop fronts. The appeals failed. In the words of the planning inspector who rejected them:-

   > "There has been a loss of characteristic detail and the replacement shop fronts are incongruous features. In addition, partially perforated metal roll shutters have been installed with protruding roller boxes. They provide a further uncharacteristic addition of poor design and quality. The replacement shop front and the shutters contrast markedly with the character of the corner premises. … The overall effect is to detract significantly from the architectural and historic character of the listed building."

4. When more than three years had elapsed from the October 2015 date for compliance, and the notices had still not been complied with, the Council began a prosecution. The defendants elected trial in the Crown Court. An application to stay the prosecution as an abuse of process was ultimately not pursued.

5. A four count indictment was preferred. The offending on Counts 1 to 4 reflected the failure of the appellants to comply with the requirements of either the LBEN (Counts 1 and 2) or the PEN (Counts 3 and 4), contrary to section 43(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and section 179(2) of the Town and Country Planning Act 1990. Both defendants pleaded guilty on 30 August 2019. On 22 October 2019 Judge Fowler deferred sentence in order to allow the defendants to complete remedial works to the buildings in line with the LBEN and PEN. At the sentencing hearing on 20 January 2020, the prosecution confirmed that both the LBEN and the PEN had been complied with and that the remedial works undertaken to the building were compliant with the LBEN and PEN and of a standard acceptable to the prosecution.

6. In his sentencing remarks the judge said:

> "During the period that is covered by the indictment, the local authority were seeking to enforce a notice to require the premises to be restored to the condition that they were in, in terms of the architectural features, when the listing took place, in relation to those that were listed, and they were frustrated by the management of the company and the company failing to carry that out. Now, it has been said that all sorts of steps were being taken but none of it justifies the failure to carry out the work and ultimately, the defendants being subject to a deferred sentence imposed in November of last year, here we are at the end of January with the work completed and something between £60,000 and £70,000 having been expended to carry out that work. There had been other efforts by other contractors, I am told, with the expense of £10,000 or so being spent on trying to resolve the matter. Not surprisingly, it did not work and that is why now, in January of 2020, we are before this court to consider what punishment is appropriate for the failure to carry out the enforcement notice.
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> My conclusion is that the failure to carry out the enforcement notice was [because] the defendant and the company considered it to be an insignificant matter that they were not prepared to engage in and to commit the necessary funds to carry it out. It might not have cost as much as £60,000 or £70,000 if it had been carried out in 2015 through to 2019, but it is a measure of the cost and that is what was being avoided. That was what was being saved by not complying with the enforcement notices and that is one of the features that I have to take account of when assessing the appropriate level of sentence; that and the damage that was done. Well, ultimately, that has been resolved, but the damage that was being sought to be resolved is clear from the photographs that I have been given contrasting those in 2010 with those in 2014 and the way that they now appear, having been restored to the appropriate architectural standard.
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> There is no way of mathematically assessing, in this case, the appropriate fine. I had in mind, prior to the deferment, a fine in the order of £40,000. However, having regard to the fact that the defendant, given the opportunity of resolving the problems, taking that opportunity and succeeding in doing so and having regard to his plea, which I put at approximately 20%, I reduce that fine to one of £25,000 which I consider to be appropriate having regard also to his culpability.
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> I have read the impressive references to his general attitude to his directorships and his reputation as a businessman, and they do him credit. Of course, that is blemished too by the fact, in 2018, he was fined for an offence, a different offence from

> those that I am dealing with here but an offence linked to his directorship, and that is an element that dents his good character; but it remains a good character and one that I have taken into account. Here, I am dealing with two defendants both of whom have no difficulty in paying a fine that is imposed, but that does not lead me to increase the penalty. It seems to me that £25,000 is an appropriate penalty and that it should be paid by both defendants. Both defendants are to pay a fine of £25,000 and, between them, to pay the sum of £10,700 by way of costs."

Guidelines and case law

7. The judge was referred to a number of decisions of this court concerning damage to or destruction of listed buildings or breaches of enforcement notices issued under the Town and Country Planning Act 1990. The cases are generally fact specific but some general principles can be found. In *Duckworth* [1994] Cr App R (S) 529, a case of alteration of a listed building without consent, this court mentioned three important factors in determining the level of penalty to be imposed. The first, which does not apply directly in a case where the alteration has been remedied, is the degree of damage that has been done to the historic structure. The second and third deserve citation in full:-

> "A second factor is the degree of financial gain that the Defendant has attempted to achieve. In nearly all cases financial gain will have been the motivation of the Defendant. If he disregards the provisions of the Act it will almost certainly have been with a view to saving himself money or to the gaining of profit for himself. Where a financial penalty is being imposed on the defendant, it must take into account the financial advantage which the defendant was attempting to achieve, otherwise the deterrent and punitive effect of the sentence may be lost.
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> Thirdly, and in many respects most importantly, is the degree of culpability of the defendant. These offences can be committed in a number of circumstances. They are sometimes described as offences of strict liability, whether or not that term is wholly accurate. But the offence may be committed through a lack of care on the part of the defendant or indeed through ignorance of his proper responsibilities in the relevant matter. On the other hand, it may be a case where the defendant has acted wilfully in disregard of the need to obtain consent, or he has even acted wilfully with an intent to damage or destroy an historic structure."

8. In *Rance* [2012] EWCA Crim 223, a demolition case where the original building had been replaced, the court said at [28]:-

> "We do not think that the level of fine should be assessed according to aesthetic considerations. The suggestion was made

> that the replacement building was of at least as great architectural quality as the original which it replaced. The real offence lay in the deliberate attempt to achieve the appellant's aim by disregard of planning procedures."

9. *R v Dagim, Fish and Deli Ltd* [2014] EWCA Crim 2927 was a case where an unauthorised structure had been erected which was still in place a year after the trial in the Crown Court. The Court referred to the three factors set out in *Duckworth* and noted that the first one (the degree of damage done to the structure) did not apply but the second and third (financial benefit sought to be achieved, and degree of culpability) did apply. The court went on to say that "while each case will depend on its own circumstances…, this is not a case of permanent and irreparable destruction, it was rather a case of obdurate disobedience over many years with identifiable financial gain".

10. The second factor mentioned in *Duckworth* required the court to "take into account the financial advantage which the defendant was attempting to achieve". This requirement has if anything been reinforced by the Sentencing Council's "General Guideline: Overarching Principles" which, in its section relating to fines, provides:-

> "Where possible, if a financial penalty is imposed, *it should remove* any economic benefit the offender has derived through the commission of the offence, including:
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> - avoided costs;
> - operating savings;
> - any gain made as a direct result of the offence
>
> The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to comply with the law.
>
> In considering economic benefit the court should avoid double recovery.
>
> …
>
> When sentencing organisations the fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law."

11. See also section 43(6) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and section 179(9) of the Town and Country Planning Act 1990, each of which provides as follows:

> "In determining the amount of any fine to be imposed on a person convicted of an offence under this section, the court shall in particular

> have regard to any financial benefit which has accrued or appears likely to accrue to him in consequence of the offence."

12. Similarly, the Sentencing Council's Definitive Guideline for Environmental Offences states that "the level of fine should reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions".

13. These provisions concern actual, rather than intended, economic or financial benefit, but, as stated in *Duckworth*, it is plainly relevant in a case such as the present to have regard to the intended financial benefit.

The two defendants issue

14. None of the reported cases on planning offences drawn to our attention by counsel involved a prosecution of both a corporate body and one of its directors. However, in *R v Rollco Screw and Rivet Co Ltd and others* [1999] 2 Cr App Rep (S) 436, a health and safety prosecution against a company and two of its directors, Lord Bingham CJ said at p 441:-

> "… One must avoid a risk of overlap. In a small company the directors are likely to be the shareholders and the main losers if a severe sanction is imposed upon the company. We accept that the court must be alert to make sure that it is not in effect imposing double punishment. On the other hand, it seems to us important in many cases that fines should be imposed which make quite clear that there is a personal responsibility on directors and that they cannot simply shuffle off their responsibilities to the corporation of which they are directors.
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> The proper approach to a case of this kind in principle seems to us to be to pose two questions. First: what financial penalty does the offence merit? Secondly: what financial penalty can a defendant (whether corporate or personal) reasonably be ordered to meet?.....
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> Addressing the first of those questions with particular reference to the instant case, we note that the total penalty imposed on the company and the directors together amounted to £50,000. We have to ask ourselves whether that sum represented an appropriate penalty to be imposed for this offending. In considering that question we have to bear in mind the glaring public need for effective sanctions in a field such as this where the health and safety of the public are so very obviously at risk.
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> We consider that the division of £40,000 attributed to the company and £10,000 to the directors was an appropriate split. We also consider that the total sum divided between the two was appropriate recognition of the gravity of this offending."

(There were also issues in the *Rollco* case about means and time to pay which do not arise in the present case.)

15. It seems to us that within the parameters of the relevant Sentencing Guidelines there are three approaches which might be taken to the imposition of fines in a case such as this, where one Defendant is a small company and the other is a director of that company. The first is, as this court appears to have done in the *Rollco* case, to form a view as to the appropriate total penalty before deciding how to apportion it between the defendants. The second, in a case where the direct financial benefit sought to be obtained or cost sought to be avoided is that of the company, is to take that factor into account in the way described in *Duckworth* in the case of the company, and then consider what penalty should be imposed on the director as having been the controlling mind of the company causing it to commit the offence and seeking thereby to achieve the financial benefit or avoid the cost for the company. The third is simply to sentence each defendant separately as if he, she or it stood alone; but this would in cases of actual financial benefit infringe the principle set out in *Rollco* that the court must avoid imposing double punishment; and neither Mr Andrew Smith QC for the Appellants nor Mr Joseph Millington for the Respondent suggested that it would be the right course to adopt in a case of this kind. Putting the matter another way, insofar as the purpose of a fine or fines is, in accordance with the General Guideline quoted above, to remove an actual financial benefit, that benefit should only be removed once.

16. Mr Smith accepted that the second approach is consistent with the Sentencing Guidelines as well as with the reported cases such as *Duckworth*. We consider that it is the one we should adopt in this case in considering whether or not the fines of £25,000 imposed on each Appellant by the judge were excessive.

Grounds of appeal

17. Five points were raised in the original grounds of appeal: (1) the judge failed properly to account for the good character of the company (2) the sentences were improperly based on aesthetic considerations (3) the sentences failed to distinguish between the two appellants and effectively imposed all the liabilities on Mr Singh, notwithstanding that he was not the sole shareholder of the company but his income was derived from the company's income (4) the judge used too high a starting point and gave inadequate credit for the guilty pleas and the compliance with the notices following the deferment of sentence (5) the judge wrongly conflated the cost of compliance (£60-70,000) with the sum that would have been the cost of timely compliance (£25-30,000), which resulted in a sentence imposed on the wrong factual basis and failed to take account of the substantial costs of the remediation works.

18. However, in his written skeleton argument and oral submissions on behalf of the two Appellants Mr Smith, who did not appear below, condensed these grounds into two, namely (a) that the judge's starting point of £40,000 for each defendant was too high, and (b) that the judge gave insufficient credit for both compliance with the terms on which sentence was deferred and the guilty pleas. For the avoidance of doubt, we do not consider that there was any merit in the pleaded ground (2), which Mr Smith did not pursue.

Discussion

19. Mr Millington frankly conceded that the judge did not explain how he "had in mind, prior to the deferment, a fine in the order of £40,000" for each of the two defendants. The judge found that the illegal alterations to the listed building might have been rectified at a cost of between £25,000 to £30,000 had the work been done promptly, but that the eventual cost was said to be in excess of £60,000.

20. It is right to say this was not a demolition case; nor a case, such as *Kohali* [2016] 1 Cr App Rep (S) 30 (in which a landlord had erected an unauthorised building and then received rent from it before the matter was brought to court), where the prosecution could point to a direct financial gain. Rather, the gravamen of the present case, as in *Dagim Fish and Deli Ltd,* was what Simon J in the latter case described as the "obdurate disobedience over many years" of the occupier of the premises and the desire to avoid the cost of restoring the historic building.

21. Dealing first with the company: Mr Smith rightly accepts that the combination of the financial benefit attempted to be avoided and the degree of culpability justified a significant penalty, but submits that any requirement of deterrence was insufficient to justify the starting point adopted by the judge. We disagree. The combination of the attempt to avoid the cost of compliance, even if that could originally have been in the bracket £25,000 to £30,000, with obdurate disobedience to the notices for a period of over three years was ample justification for the starting point which the judge took.

22. As to the reduction to reflect the remediation work and the plea of guilty, again we do not consider that the judge was in error. The pleas of guilty were entered on arraignment of the defendants in the Crown Court, but this was only after an application to stay the criminal proceedings as an abuse of process had been considered. The total reduction from £40,000 to £25,000 was in our view an adequate one to reflect both the plea of guilty and the fact that the remediation works had been carried out following sentence being deferred.

23. Turning to Mr Singh, he was not the occupier of the premises and so did not directly receive a benefit, though he was a shareholder as well as an employee of the company. He was the sole active director or controlling mind of the company and caused it to commit the offences to which it had pleaded guilty; and although otherwise of good character he had been fined in 2018 for what the judge described as "a different offence from those I am dealing with here, but an offence linked to his directorship". In those circumstances, the fine of £25,000 imposed on him cannot be regarded as excessive either.

24. For these reasons both appeals against sentence are dismissed. The appellants must in addition pay the costs of Birmingham City Council in this court, amounting to £3,491.00.